United States Court of Appeals

for the Second Circuit

REPLY BRIEF

Nos. 75-4089, 75-4121

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN BROADCASTING COMPANIES, INC., *ET AL.*,
Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,
Intervenor,

v.

WRITERS GUILD OF AMERICA, WEST, INC.,
Respondent.

ON PETITION FOR REVIEW AND APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Union contends (Br. 13) that the Employers agreed in prior collective bargaining contracts to permit hyphenates to honor picket lines and that the Employers thereby waived their right to the protection of Section 8(b)(1)(B) of the Act. The cited contract provision, however, makes no reference to hyphenates performing non-writing functions and merely provides that "writer members" may observe Union picket lines (GCX 2, p. 22, GCX 9, p. 22). The provision was thus plainly intended

to allow writers, but not hyphenates performing non-writing functions, to observe picket lines. This interpretation is buttressed by the contract's further provision that striking writer members must complete the "writing of any [previously assigned] material" following the conclusion of a strike (GCX 2, p. 22, GCX 9, p. 22). Since a statutory right is not waived absent clear and unmistakable contract language, it is clear that the inclusion of the cited provision in the parties' collective bargaining contracts did not waive the Employers' right to the protection of Section 8(b)(1)(B). See *Gary Hobart Water Corp. v. N.L.R.B.*, 511 F.2d 284, 287 (C.A. 7, 1975); *Meat Cutters Union Local 81 v. N.L.R.B., (Safeway Stores)*, 458 F.2d 794, 796 n. 3 (C.A.D.C., 1972); *Toledo Locals Nos. 15-P and 272, Lithographers Union (Toledo Blade)*, 175 NLRB 1072, 1081 (1969), enf'd, 437 F.2d 55 (C.A. 6, 1971).

2. In finding that Section 8(b)(1)(B) proscribed the Union's disciplinary actions, the Board explicitly relied (A. 124) upon two of its recent decisions which explained in detail how union discipline of supervisors who crossed picket lines was likely to affect their post-strike performance of their supervisory functions. See *Chicago Typographical Union No. 16 (Hammond Publishers)*, 216 NLRB No. 149, 88 LRRM 1378, 1380-1381 (1975); *New York Typographical Union No. 6 (Daily Racing Form)*, 216 NLRB No. 147, 88 LRRM 1384, 1386 (1975). Board Member Fanning's summary dissent in the instant case also incorporated by reference his lengthy dissenting opinion in *Daily Racing Form, supra*, which addressed the same considerations. It is thus clear that the Board's finding in the instant case was predicated in part upon the Board's previously articulated fear that Union strike discipline was likely to carryover and affect supervisors' post-strike actions. And, as the Supreme Court pointed out in *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 n. 6

(1965), the Board may, of course, "articulate the basis of its order by reference to other decisions. . . ." Accordingly, the Union's contention (Br. 15-17) that the Board did not consider the foreseeable consequences of the Union's discipline in finding a violation is completely unfounded.

3. Relying on the fact that the union discipline found lawful in *Florida Power*[1] tended to deprive the employer of his supervisors' services, the Union argues (Br. 16-17) that its attempts to deprive the Employers of the hyphenates' services in the instant case were also lawful and that the Board's contrary finding is thus inconsistent with the Supreme Court's *Florida Power* decision. The Union fails to recognize, however, that the union discipline in *Florida Power* deprived the employer of his supervisors' services not as supervisors, but rather as strike-breaking replacement employees performing principally rank-and-file struck work. The Supreme Court clearly recognized the significance of this distinction when it emphasized the non-supervisory nature of the services performed by the disciplined supervisors in *Florida Power* (417 U.S. at 805):

> It is certain that these supervisors were not engaged in collective bargaining or grievance adjustment or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.

Moreover, the Court noted (417 U.S. at 812 n. 22) that, "in *Illinois Bell* . . . those who did work during the strike but performed only their regular duties were not disciplined by the union" and that "in *Florida Power* the union did not discipline those who [crossed picket lines] only to

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[1] *Florida Power & Light Co. v. I.B.E.W. Local 641*, 417 U.S. 790 (1974).

perform their normal supervisory functions." The Board's decision in the instant case is therefore totally consistent with the Supreme Court's decision in *Florida Power*.[2]

4. The Union relies (Br. 17-18, 20, 23) upon *N.L.R.B. v. San Francisco Typographical Union 21*, 486 F.2d 1347 (C.A. 9, 1973), cert. denied, 418 U.S. 905, in support of its contention that its discipline of the hyphenates did not restrain the Employers in their selection of Section 8(b)(1)(B) representatives. The Union's reliance is clearly misplaced. Although the Ninth Circuit there held that union discipline of strike-breaking supervisors did not violate Section 8(b)(1)(B), the court and Board decisions in the case clearly reveal that the disciplined supervisors were performing substantial amounts of rank-and-file struck work in addition to their supervisory duties during the strike. *N.L.R.B. v. San Francisco Typographical Union 21, supra*, 486 F.2d at 1350; *San Francisco Typographical Union 21*, 193 NLRB 319, 321-323, 325 (1971). The cited decision is thus clearly distinguishable from the instant case in which the hyphenates did not perform rank-and-file struck work during the strike and accordingly did not expose themselves to lawful union discipline.

5. The Union contends (Br. 18-20) that its discipline of the hyphenates did not violate Section 8(b)(1)(B) because the "only objective of the

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[2] The Union's related contention (Br. 16) that the *Florida Power* supervisors were performing Section 8(b)(1)(B) functions during the strike is also without merit. As noted above, the Supreme Court explicitly stated that the *Florida Power* supervisors were not performing Section 8(b)(1)(B) functions when they were disciplined. Furthermore, the Union's reference (Br. 16 n. 14) to Appendix A to the Board's decision in *Florida Power* does not support its contention. Appendix A was merely a stipulation that certain union members had been selected as Section 8(b)(1)(B) supervisors before the strike and that these persons had been disciplined for performing struck work. Appendix A thus tends to refute and clearly does not support the Union's contention that the *Florida Power* supervisors were performing Section 8(b)(1)(B) functions rather than rank-and-file work during the strike.

discipline . . . was to secure the hyphenates' support of the strike." It is clear, however, that it is the *effect* of union discipline, rather than the union's motivation for imposing that discipline, which must be considered in determining whether a union has coerced an employer in his selection of Section 8(b)(1)(B) representatives. *Florida Power, supra,* 417 U.S. at 804-805 ("union discipline of . . . a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing [his Section 8(b)(1)(B) duties]"); *Chicago Typographical Union, No. 16 (Hammond Publishers),* 216 NLRB No. 149, 88 LRRM 1378, 1379 (1975) ("we do not read the Supreme Court's [*Florida Power*] decision as turning on a determination of the motivation behind a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as a Section 8(b)(1)(B) representative"). As shown in the Board's opening brief (pp. 24-27), the Union's discipline "adversely affected" the hyphenates performance of their Section 8(b)(1)(B) duties and thereby unlawfully coerced the Employers. Furthermore, even if the Union's motivation were considered, the Union's discipline of the hyphenates would still violate Section 8(b)(1)(B) since the Union did not discipline hyphenates for performing rank-and-file writing work behind the picket lines. To the contrary, the hyphenates were disciplined for violating Strike Rule 12 prohibiting crossing of picket lines rather than Strike Rules 2-7 prohibiting writing for struck employers (A. 80-81; GCX 15A-W). It is thus clear that the purpose as well as the effect of the Union's action was to deprive the Employers of the services of their first-line supervisors in violation of Section 8(b)(1)(B).

6. With respect to its discipline of executives, producers, and directors, the Union argues (Br. 24) that the record evidence does not demonstrate that these hyphenates adjusted grievances involving writers. The record evidence clearly demonstrates and the Union concedes (Br. 31), however, that executives, producers, and directors all adjusted grievances involving actors, camermen, secretaries, and other non-writing employees of the Employers. Since the clearly foreseeable effect of the Union's discipline was to force the hyphenates to honor the Union's picket lines and since the hyphenates' resulting absence would clearly have deprived the Employers of their chosen representatives for the adjustment of grievances of their non-writing employees, the Union discipline clearly restrained the Employers in violation of Section 8(b)(1)(B). *Int'l Organization of Masters, Mates and Pilots v. N.L.R.B.*, 486 F.2d 1271, 1274-1275 (C.A.D.C., 1973), cert. denied, 416 U.S. 956 (union strike to protest selection of grievance adjusters violates Section 8(b)(1)(B) notwithstanding that another union represents employees whose grievances were adjusted).

7. While conceding (Br. 29) that story editors criticized writers' work products, influenced the settling of grievances regarding the allocation of writing credits, and ameliorated writers' feelings when scripts had to be rewritten, the Union nevertheless argues (Br. 28-30) that these activities did not constitute grievance adjustment because unresolved disputes were referred to higher management. This contention is clearly without merit. The Board and courts have repeatedly found supervisors who participated in the initial discussion of employee complaints to be "representatives for the purposes of . . . the adjustment of grievances"

within the meaning of Section 8(b)(1)(B) even though unresolved complaints were processed through higher levels of formal or informal grievance procedures. See *Toledo Blade, supra,* 175 NLRB at 1077-1078; *Meat Cutters Union Local 81 (Safeway Stores),* 185 NLRB 884, 888 (1970), enf'd, 458 F.2d 794 (C.A.D.C., 1972); *Sheet Metal Workers, Local Union 49 (General Metal),* 178 NLRB 139, 141 (1969), enf'd, 430 F.2d 1348 (C.A. 10, 1970). Moreover, the legislative history of Section 8(b)(1)(B) reveals a specific concern over unions' pressure with respect to foremen, who represent perhaps the most common type of first-line supervisory employees. 93 Cong. Rec. 3837 (1947) (remarks of Senator Taft); 93 Cong. Rec. 4143 (1947) (remarks of Senator Ellender). Indeed, if the Union's contention were accepted, then only the very highest official in an employer's corporate hierarchy would be a representative for the adjustment of grievances. It is thus clear that the story editors, by criticizing writers, by influencing the allocation of disputed credits, and by ameliorating writers' resentments, are Section 8(b)(1)(B) representatives of the Employers for the purpose of grievance adjustment.[3]

8. Finally, the Union contends (Br. 41-43) that the record evidence does not demonstrate that the disciplined hyphenates performed supervisory functions during the strike. Substantial evidence on the record as

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[3] The Union's argument (Br. 20-23) that hyphenates should be subject to discipline for strikebreaking because they may someday benefit — as writers — from concessions won by the strike misconceives the issue, for it is the Employer's interests which are protected by Section 8(b)(1)(B). Thus, the equity of allowing hyphenates to escape union discipline is at most a marginally relevant consideration. See *Safeway Stores, supra,* 458 F.2d at 800; *New Mexico District Council (Horner II),* 177 NLRB 500, 502 (1969), enf'd, 454 F.2d 1116 (C.A. 10, 1972). Moreover, the "benefit" is itself remote, for it could be realized only by accepting future employment, not as executives, producers, directors, or story editors, the capacities in which they crossed the picket line and worked, but as writers. The Union's assertion (Br. 22) that story editors, as such, receive benefits from the collective bargaining agreement is unfounded, for the contract provision cited speaks only of a "person employed as a writer" and makes no reference to story editors.

a whole, however, clearly supports the Board's determination that those hyphenates who crossed Union picket lines performed their customary duties as executives, producers, directors, or story editors during the strike. See Board's opening brief, pp. 12, 31-32. Since, as the Union concedes and as shown *supra,* the hyphenates customary duties included the performance of Section 8(b)(1)(B) functions, the Board could reasonably conclude that the hyphenates continued performing these functions during the strike. Moreover, even if the record evidence did not affirmatively demonstrate that the hyphenates performed those functions during the strike, the Union discipline would still be unlawful since the hyphenates were clearly Section 8(b)(1)(B) representatives prior to the strike, the Union discipline clearly tended to deprive the Employers of the services of these Section 8(b)(1)(B) representatives, and there was no evidence whatsoever that the hyphenates were performing substantial rank-and-file writing work which might arguably have justified the Union discipline. See *Horner II, supra,* 177 NLRB at 502; *Wisconsin River Valley District Council (Skippy),* 218 NLRB No. 157, 89 LRRM 1477, 1478 (1975).[4]

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[4] The Union argues (Br. 42) that story editors at least could not have performed such functions during the strike because there were no writers at work. There is no evidence, however, that all rank-and-file writers honored Union picket lines; to the contrary, statements by both Union counsel and an Employers' official suggest that writers were submitting a substantial number of scripts to the Employers during the strike (Tr. 1213-1215, RX 7 — reproduced as a Supplemental Appendix to this Reply Brief).

CONCLUSION

For these reasons, as well as those discussed in our opening brief, we respectfully submit that the Board's order should be enforced in full.

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March 1976.

SUPPLEMENTAL APPENDIX

RESPONDENT'S EXHIBIT NO. 7

THE HOLLYWOOD REPORTER

Monday, June 4, 1973

TALKS COLLAPSE AGAIN; WRITERS STRIKE GOES ON

By Will Tusher

A new attempt to break the deadlock over pay-TV and other supplemental markets came to naught after a futile all day effort Saturday as the Writers Guild and the Association of Motion Picture and Television Producers once more called off negotiations. The strike moves into its 14th week tomorrow.

In the wake of the latest collapse of discussions, AMPTP executive v-p Billy H. Hunt forecast failure for the WGA alternative plan of offering a three-year company-by-company minimum basic agreement, and he warned that the association did not plan to stand by idly while the WGA circumvented the association.

Hunt served notice that the AMPTP would in turn ignore the WGA and "hire whoever we can." He declared, moreover, that the association will intensify already successful efforts to acquire under-the-table scripts, some of which, he said, already have been sold by WGA members.

"I don't think we're getting as many scripts as we'd like to get," Hunt conceded, "but on the other hand we're getting many more than Mike (WGA executive director Michael Franklin) would like to have us get."

The new three-year WGA optional agreement has been completed, The Hollywood Reporter has learned, and soon will be made available, notwithstanding Hunt's admonition that the WGA is making a serious

mistake in pursuing this course. The pact will embody all the elements of accord reached with the AMPTP before the breakoff of negotiations, and will include, in addition, the pay-TV and cassette formula and money package contained in the interim one-year MBA stipulated to, as of yesterday, by some 209 independent signatories.

"It looks like we are really impassed," Hunt conceded yesterday. "But Mike (Franklin) can call or I'll call and we'll keep exploring what the overall ramifications are. There's no way to know, but you have to keep talking. If you don't talk, you'll never make an agreement."

The WGA, however, confined itself to

(Continued on Page 5)

(Continued from Page 1)

terse announcement of the latest collapse of talks, and declined to comment on prospects for another round of discussions. There had been hope, if not overt expectation, by the WGA that AMPTP initiative in asking for Saturday's talks signalled a change in position on supplemental markets.

Hunt challenged the validity of such assumptions. He confirmed that the AMPTP gave no hint on what its posture would be, but he insisted that it would have been just as plausible for the AMPTP to assume that, in accepting the invitation, the WGA was prepared to modify its 1.2 percentage and retroactivity demands on pay-TV, cable and cassettes.

Meanwhile, the supplemental market is set to surface again when the AMPTP meets with the Directors Guild tomorrow. The review of DGA proposals was completed Friday, but the question was not examined in depth. Apprised of the breakoff of Saturday's WGA talks, DGA president Robert Wise told the Reporter yesterday, "I was hoping for something more positive."

Hunt conceded that the DGA proposals were tougher than the WGA's, especially on supplemental markets, but he maintained that talks were not necessarily foredoomed. He compared discussions to a piece of cloth to be examined strand-by-strand.

Franklin, Gary Ellingsworth and WGA president John Furia Jr. met with key AMPTP negotiators in sidebar discussions all Saturday morning. There were wider parlays with the negotiating commitee 2 p.m. but at 3:20 p.m. both sides gave up the ghost, and the guild released news of the fact that the talks were broken off. Half an hour later, there was an abortive surge of hope "that maybe something good is happening" as a WGA spokesman ordered the breakoff story killed because another attempt was being made to reach a settlement. Discussions were terminated again at 5 p.m.

"Both sides were just reluctant to leave," Hunt commented. "We kept exploring and probing around. That was true as far as the writers were concerned, and that was true as far as we were concerned . . . We did keep trying . . . It was just one of those things."

WGA live and tape negotiations with the three networks in New York, recessed Friday, will be resumed in Hollywood in about 10 days.

Hunt expressed skepticism that the new three year WGA agreement would break the AMPTP resolve or result in meaningful defections. He held it unlikely that it would be signed by companies other than those which already have accepted the interim independent agreement.

"Our member companies," Hunt pointed out, "all know what has been agreed to, and our member companies are the ones that are telling us not to make the deal. Whether this would be more attractive to some of them or not, I don't know."

However, the AMPTP executive did not profess indifference over the possible impact of the WGA's new three year pact.

"Anytime one of the unions tries to go around the association and fragment the bargaining unit, of course it concerns me," he asserted. "I think it's a mistake for the writers to do that, and I would advise them not to do it. If they're going to do it, they're going to do it, and there isn't anything I can do to stop them. I think it's a mistake, and I told them so."

He noted that the writers would stand apart from the Directors Guild, the Screen Actors Guild, the IA "and everyone else" as a union operating without a "unified bargaining unit." He said it was inevitable that the plan would backfire.

"From the writers' point of view," Hunt stated, "how are they going to police every independent that comes into town and forms a corporation and hires a writer? They can't do it. How are they going to police their grievances? Chase 600 independent companies all over – companies that can form and dissolve overnight? Without the association they really don't have a contract that is enforceable. They've got to catch everyone, don't they?"

Hunt disclosed that there is a greater availability of under-the-table scripts for theatrical firms and established series than there is for new TV shows.

"There's more of a problem . . . where you don't have established formats, characterizations and look," he remarked. "On established shows we're getting scripts and we'll probably be able to produce the season, as far as we can tell. On the new shows, which have just been sold, which don't have the established characters, it's a different story. We're getting

some scripts, but we're not getting as many as we want."

Talks with the WGA would be resumed formally or informally anytime at the request of either side, Hunt said. He insisted that the latest failure was not marked by rancor.

"If either side says, 'Let's sit down and have a cup of coffee together,' the other side would say, "Fine, let's do it,' " he vouchsafed. "It's not a situation where there is bitterness or animosity, or reluctance to try to talk and reach agreement, and to keep avenues open for conversation and exploration. I don't feel that on the writers' side, and I don't feel that on my side."

He insisted that protocol precluded preconditions justifying new talks, even though the latest attempt, with both sides remaining adamant, proved fruitless.

"I don't think anyone ever wants to ask that question (Is it an exercise in futility?) because they're always afraid of the answer," he observed. "It's better to arrive and be hopeful than it is to say there's no sense in talking if you still feel the same."

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * * * *

TR. 1213

MR. HACKLER: I would like to add in connection with the offer of proof of Mr. Hunt's testimony, would be if called and sworn as a witness and in lieu of his testimony, I would like to offer Respondent's Exhibit 7.

So far as the Respondent is concerned the relevant portion that the newspaper quotes that are relevant to this particular proceeding, there is other material there, have been marked by pen.

JUDGE BARBAN: All right. Very briefly, Mr. Hackler, would you explain why you consider this to be relevant and material to this hearing?

MR. HACKLER: Yes, your Honor.

It is not offered – I will start off negatively – for the purpose of inquiring into the effectiveness of the disciplinary threats that are the substance of the complaint here.

It is rather offered as circumstances under which the threats of discipline were made, namely, the factual statement of the witness through the quoted and marked material, that the employers are engaging in efforts which of course are lawful in a strike, to acquire scripts and that they have already acquired scripts from W.G.A. members during this strike – that is on the first page of the exhibit.

TR. 1214

The fifth page where marked it further shows the setting in which the disciplinary threats occurred as being that there is an on-going campaign, lawful in character but nevertheless relevant here, to obtain scripts throughout the strike.

I am not certain if the record reflects up to this point that while the strike is on, unlike some employers, the employers are operating and there might be an inference by the absence of evidence that they are shooting scripts that they already had before the strike or from their library.

I think in judging whether or not the threats which are admitted here of disciplinary action, whether those threats amount to a coercion of the employer's rights under 8(b)(1)(b) – the thrust of the whole case – that they ought to be weighed and measured by the Board and courts if

necessary in the light of any campaign on the part of the employers to obtain new scripts and obtaining new scripts during the strike from W.G.A. members.

JUDGE BARBAN: There is one thing I would like to add; I have very briefly scanned this, I have obviously not had the time to read it carefully, I note however, that this purports to be a statement made by Mr. Hunt allegedly in reply or in connection with an alleged attempt by the union to sign the companies up on an individual basis.

Now I remember reading in one prior paper – probably the

TR. 1215

only other one I have read since I have been here, that it was alleged in that paper that a strategy was alleged in that paper on the part of the union that if they could not sign up the Association as a whole, that they were going to attempt to sign up independents or members of – I don't remember exactly – or members of the Association.

Have I accurately stated it?

MR. HACKLER: Except for this, the exact quote of Mr. Hunt while I agree with you that the article is written is in the context of developments in or about before. The statement I am interested in is the following:

The Association will intensify already successful efforts to acquire – already successful efforts – to acquire under the table, scripts, some of which have been sold by W.G.A. members. I don't think we are getting as many scripts as we would like to get – on the first page – and on the fifth, the marked portion without quoting it – it speaks for itself – shows the existence of an on-going previous campaign to obtain these scripts.

To answer your Honor's question, maybe this was just a counter-ploy.

* * * * *

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Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 31st day of March, 1976.